CORPORATION COURT OF CITY OF ALEXANDRIA.

IN RE PETITION OF JAMES R. CATON, JR., ET AL.
June 7, 1922.

Where a clerk of court, who has been elected to succeed himself, dies before the beginning of the new term, his successor appointed by the court to fill the vacancy for the unexpired term holds over for the duration of the new term by automatic operation of law, without special election or reappointment.

Order in the matter of the petition of James R. Caton, Jr., and others, qualified voters of the city of Alexandria, for an order directing a writ of election to issue for an election to be held on the 7th day of November, 1922, for the election of a clerk of this court to fill the full term commencing February 1, 1923.

ROBINSON MONCURE, J. The said petition coming on to be heard this 7 day of June, 1922, and being argued by counsel, upon consideration whereof, and it appearing to the court that N. S. Greenaway was duly elected and qualified as clerk of this court for a term of eight years beginning February 1, 1915, and at the November, 1921 election was elected to succeed himself for the term of eight years beginning February 1, 1923, but never qualified as such, and died on April 3, 1922, and that this court on May 2, 1922 appointed Elliott F. Hoffman for the unexpired term of said N. S. Greenaway and until his successor should be elected and qualified, as well as for any other vacancy in said office incident to the death of said N. S. Greenaway, and that said Elliott F. Hoffman has within thirty days of his appointment duly qualified in the manner required by law: the court doth order that the prayer—of said petition—be and the same is hereby denied, and that the order for a writ of election to issue directing that an election be held on November 7, 1922, for the election of a clerk of this court to fill the full term of office of said clerk commencing February 1, 1923, be and the same is hereby refused.

And the court states reasons as follows:

1. The order appointing said Elliott F. Hoffman clerk certainly covers the residue of the current unexpired term, to-wit: until February 1, 1923, and the authority therefore is clearly and exclusively within the power of this court. This authority is not disputed by petitioners. (Code Va. Sec. 136: Opinion Atty. Gen. Va.). Even if there were at the date of the entry of the appointment order such vacancy (which the court does not consider as now or hereafter existing under the law as hereinafter set forth) in the new term beginning February 1, 1923 and running for eight years thence next ensuing, as contemplated in said Sec. 136, which the court could appoint to, said Hoffman would hold same by virtue of the language of the appointing order, to-wit: "to fill all vacancies in the said office of clerk"

2. Should however the power of appointment in the court only

extend to the residue of the current unexpired term, then the succession or continuance is a matter of law, dependent upon express constitutional and statutory enactments and general common law and common sense principles.

A. Said Hoffman having been duly appointed and qualified not only holds and discharges the duties of his office until February 1, 1923, but continues thereafter to do so until his successor has qualified. (Cons. Va. Sec. 33: Code Va. Sec. 134: Opinion Atty. Gen. Va.: Common Law Maxim "Vacancy in office is abhorrent": Principle of common sense, to-wit: That the important office of clerk intimately dealing with all men's affairs should at all times be filled by a competent public servant: Chadduck *v.* Burks, 103 Va. 684; Wayt *v.* Glasgow, 108 Va. 110, and authorities cited in each case: Hoyt *v.* Metcalfe, 88 N. E. 738, 80 Ohio St. 244; State ex rel Atty. Gen. *v.* Speidel, 62 Ohio St. 156.)

What rights then has a successor to qualify? The court deems, to-wit: only by virtue of a due legal appointment or election.

B. The appointment so far as the appointing order is concerned has been discussed in (1) above, and as under (2-A) above by automatic operation of law there is no vacancy on and after February 1, 1923, this court then necessarily has no appointive power, and really could not make a new appointment if it so desired because there is no vacancy to appoint to. (Authorities cited under (2-A) above.)

As to Election, such are general and special.

C. There will of course be the general election of November, 1929, which everyone concedes to be under our present system the periodical legal routine method that will in due course provide a clerk entitled to qualify on February 1, 1931, and the periodical legal routine general election for the clerkship official period of eight years from February 1, 1923 to February 1, 1931, was held in November, 1921, and is past, so no general election by law is therefore possible, leaving petitioners only to whatever relief, if any, the law provides as to special elections.

D. Section 130 of Code of Virginia is not applicable, in that its language taken in its full natural and ordinary sense and acceptance only applies to vacancies or newly created positions which are "required to be filled by the qualified voters"—and where the election,—"shall not be specially provided for by law". The filling of a vacancy in the office of clerk under the conditions in this case is by Sec. 136 Code Va. an appointive function of the judge, and the election of clerk is by Sec. 129 Code Va. specially provided for, hence Sec. 130 Code Va. is not met by the facts and law of this case. Counsel for petitioners in his argument and brief admits (except for said Sec. 130 already held inapplicable by this court) that there is no other provision either

in constitution or statute under which the qualified electorate of Alexandria have right to an election in this matter upon the facts.

E. The court cannot follow the suggestion of learned counsel for petitioners that provisions as to special elections in the old code of 1887 left out of or changed in the present revised code of 1919 remain a part of the law of this state. It appears to the court that for any such provisions to remain as law it should be expressly so stated or else so appear from necessary implication, and which is not the case here, and to accept the view of counsel for petitioners would subject the bar and people of this state to the indeterminate and indefinite position of considering everything that previously had ever been the law. It is most reasonable to presume that the revisors and the general assembly that subsequently ratified their immense labor (founded upon the new constitution which is subsequent to the code of 1887) did what they intended to do, and especially so when they dealt with the very sections specifically mentioned by said counsel for petitioners. Also Sec. 6567 Code of 1919 expressly repeals,—"all acts and parts of acts of a general nature in force at the time of the adoption of this code—from and after the said 13th day of January, 1920",—with certain limitations and exceptions. Also Acts 1897-8, p. 687, amend and re-enact said provisions of the code of 1887.

F. In view of the constitutional inhibition on the general assembly to enact any local, special or private law for conducting special elections (Cons. Va. Sec. 63, desig. 11) and also in view of the opinion and language of the court in the case of Wayt *v.* Glasgow (106 Va. 110) at page 115, to-wit:—"No one can read our present constitution and doubt that it was the purpose and aim of the honorable body framing it to generally provide against the frequency of elections made necessary by the provisions of the constitution theretofore in force since 1870: and recognizing that the carrying out of that policy by provisions in the new constitution and the acts of the general assembly enacted in pursuance thereof would necessarily give rise to cases of the character of the one we have before us, section 33 of the constitution—a provision in our former constitution, and found in the organic laws of nearly all, if not all, of the several states of the union—was adopted, which provides that all officers elected or appointed shall continue to discharge the duties of their offices after the terms to same have expired, *until their successors have qualified*",—and also in view of the fact that the local public sentiment seems to be in thorough accord with the general law and sentiment of the state at large as appears to be evidenced by the fact that out of a voting list of approximately 4,200 people only 33 have signed the petition herein, the court deems that, even if it so desired, it is bevond its jurisdiction and power to order an election under